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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,207	04/08/2004	David Alan Benner	BENNER-1	7438

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LAMORTE & ASSOCIATES P.C.  
P.O. BOX 434  
YARDLEY, PA 19067

EXAMINER

FERGUSON, MICHAEL P

ART UNIT PAPER NUMBER

3679

DATE MAILED: 12/30/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/820,207

Applicant(s)

BENNER ET AL.

Examiner

Michael P. Ferguson

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 13 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) 9 and 16 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10-15, 17 and 18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 April 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Claims 9 and 16 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in a telephone conversation with Eric A. LaMorte, Esq. on July 5, 2005.

### ***Claim Objections***

2. Claim 1 is objected to because of the following informalities:

Claim 1 (line 5) recites "point deposited between". It should recite --point disposed between--.

For the purpose of examining the application, it is assumed that appropriate correction has been made.

### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-3,5-8,10-14, 17 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by MacDougall (US 4,673,166).

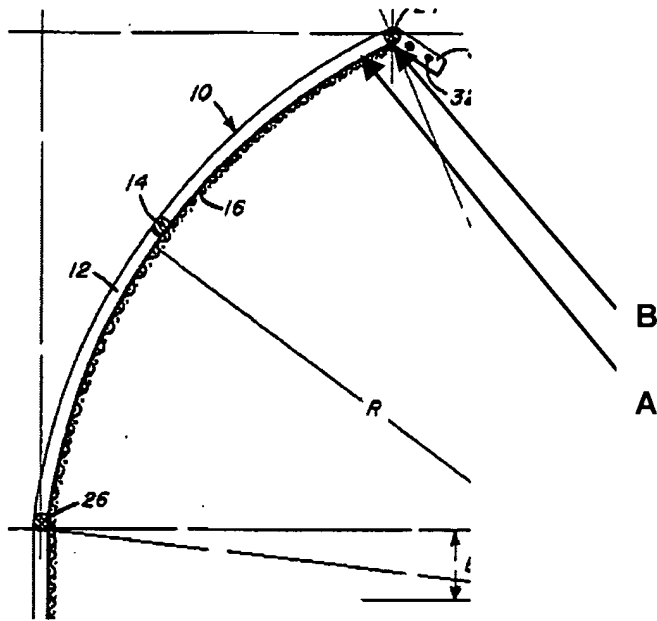
As to claim 1, MacDougall discloses a fencing system for confining climbing animals, the system comprising:

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a plurality of vertical posts **12**, each vertical post having a top end and a bottom end;

a plurality of canopy support brackets **30** that are supported by the vertical posts, each canopy support bracket having a first end, a second end and an apex point **B** (Figure 2 reprinted below with annotations) disposed between the first end and the second end, wherein an ascending section **A** (not shown; inherently, bracket **30** must have an ascending section **A** attached to posts **12**; column 4 lines 23-29) exists between the first end and the apex point, and a descending section **30** exists between the apex point and the second end;

a continuous section (not shown; netting **16,32** may be a single section of netting; column 4 lines 23-29) of flexible netting **16,32** suspended between the vertical posts and the canopy support brackets, the flexible netting being attached to the vertical posts, the ascending section of each canopy support bracket and the descending section of each canopy support bracket, wherein the flexible netting is supported vertically by the vertical posts, the flexible netting is supported in an ascending angle to an apex point above the vertical posts by each the ascending section of the canopy support brackets, and the flexible netting is supported in a descending angle from the apex point to the second end of the canopy support brackets by each the descending section of the canopy support brackets (Figures 1 and 2, column 4 lines 23-29).



As to claim 2, MacDougall discloses a system wherein the first end of the canopy support brackets **30** selectively interconnect with the top end the vertical posts **12**, whereby the canopy support brackets are supported above the vertical posts (Figure 1).

As to claim 3, MacDougall discloses a system wherein the ascending section **A** and the descending section **30** of each canopy support bracket **30** is straight (Figure 2).

As to claim 5, MacDougall discloses a system wherein the flexible netting **16,32** is comprised of intersecting filaments having a diameter of less than 0.10 inches that define net openings of at least one square inch (based on the scale of Figure 1).

As to claim 6, MacDougall discloses a system wherein the flexible netting **16,32** is black (Figure 1).

As to claim 7, MacDougall discloses a system including mounting elements **20** that engage the vertical posts **12** and support the vertical posts in a vertical orientation (Figure 2).

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As to claim 8, MacDougall discloses a system wherein the mounting elements **20** are ground anchor sleeves that are disposed in the ground, wherein the ground anchor sleeves receive the vertical posts **12** and support the vertical posts in the vertical orientation (Figure 2).

Applicant is reminded that **process limitations are given little patentable weight in product claims**. The patentability determination of product-by-process claims is based on the product itself, even though such claims are limited and defined by the process. See MPEP § 2113. "The patentability of a product does not depend on its method of production." In re Thorpe, 777 F.2d 695,698,USPQ 964,966 (Fed.Cir.1985).

As to claim 10, MacDougall discloses a system including ties (inherently; not shown) for selectively binding the flexible netting **16,32** to the vertical posts **12** and the canopy support brackets **30** (Figure 1, column 4 lines 23-29).

As to claim 11, MacDougall discloses a system including a protective mesh **16,32** that extends partially up the vertical posts **12** and along the ground (Figure 1).

As to claim 12, MacDougall discloses a system wherein the protective mesh **16,32** is defined by intersecting metal wires (Figure 1).

As to claim 13, MacDougall discloses a method of constructing a fence, comprising the steps of:

erecting a plurality of supports **12** along a periphery to be fenced, wherein each of the supports has a vertical section **18**, an ascending section **A** that extends at an

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angle above the vertical section to an apex point **B**, and a descending section **30** that extends downwardly from the apex point to a free end;

attaching a continuous section (not shown; netting **16,32** may be a single section of netting; column 4 lines 23-29) of flexible netting **16,32** to each vertical section, the ascending section and the descending section of the supports, wherein the flexible netting is supported vertically by each the vertical section of the supports, the flexible netting is supported an ascending angle to the apex point by each the ascending section of the supports, and the flexible netting supported in a descending angle from the apex point to the free end of the supports by each the descending section of the supports (Figures 1 and 2, column 4 lines 23-29).

As to claim 14, MacDougall discloses a method wherein the step of erecting a plurality of supports **12** includes the substeps of:

erecting a plurality of vertical posts **12**;

attaching a canopy support bracket **30** to each of the posts, wherein each the canopy support bracket embodies the ascending section **A** (not shown; inherently, bracket **30** must have an ascending section **A** attached to posts **12**; column 4 lines 23-29) and the descending section **30** of each the support (Figure 2).

As to claim 17, MacDougall discloses a method including the step of placing a wire mesh **16,32** between the supports **12** proximate the ground (Figure 2).

As to claim 18, MacDougall discloses a method wherein the flexible netting **16,32** is comprised of intersecting filaments, wherein each filament has a diameter of less than

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0.10 inches and the filaments define net openings having an area at least one square inch (based on scale of Figure 1).

***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over MacDougall.

As to claim 4, MacDougall fails to disclose a system wherein the ascending section and the descending section of each canopy support bracket intersect at the apex point at a perpendicular angle.

The applicant is reminded that a change in the shape of a prior art device is a design consideration within the skill of the art. In re Dailey, 357 F.2d 669, 149 USPQ 47 (CCPA 1966). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a system as disclosed by MacDougall wherein the ascending section and the descending section of each canopy support bracket intersect at the apex point at a perpendicular angle as such practice is a design consideration within the skill of the art.

7. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over MacDougall in view of Sparks (US 249,803).



As to claim 15, MacDougall fails to disclose a method wherein the substep of erecting a plurality of vertical posts includes driving ground anchor sleeves into the ground and inserting a vertical post into each ground anchor sleeve.

Sparks teaches a method wherein the substep of erecting a plurality of vertical posts **A** includes driving ground anchor sleeves **C** into the ground and inserting a vertical post **A** into each ground anchor sleeve; the ground anchor sleeves positively mounting and securing the vertical posts in the proper vertical orientation (Figure 1). Accordingly, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify a method as disclosed by MacDougall to have ground anchor sleeves as taught by Spark in order to positively mount and secure the vertical posts in the proper vertical orientation.

### ***Response to Arguments***

8. Applicant's arguments with respect to claims 1-8, 10-15, 17 and 18 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to the applicant's disclosure. The following patents show the state of the art with respect to fencing systems:

Forrester (US 5,662,313) and Sanford, Jr. et al. (US 5,461,364) are cited for pertaining to fencing systems comprising a plurality of vertical posts and a plurality of canopy support brackets.

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9. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael P. Ferguson whose telephone number is (571)272-7081. The examiner can normally be reached on M-F (8:00-5:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571)272-7087. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



MPF

12/19/05



DANIEL P. STODOLA  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 3600